Supreme Court, U.S.
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No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1998

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

KOLOSSO AUTO SALES, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Seventh Circuit err in holding — despite this Court's requirement that any impairment of a contract by a state "must be * * * for an end which is in fact public," *Triegle* v. *Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) — that a state may freely impair a contract with *no* public justification, so long as the impairment is "small."

2. Is state legislation impairing a contract "foreseeable," and therefore not a "substantial" impairment, in the absence of *any* prior retroactive legislation in the field and in the face of prior opinions of the Eighth Circuit and other courts striking down similar impairments under the Contract Clause.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner DaimlerChrysler Corporation, formerly Chrysler Corporation, states that it has one parent company, DaimlerChrysler AG, a publicly traded German stock corporation. DaimlerChrysler Corporation has nonwholly owned subsidiaries, which are set forth in App. F, *infra*.

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PETITION FOR A WRIT OF CERTIORARI

The accepted wisdom in real estate and retail business is that location is critical to success. In recognition of this basic principle, petitioner DaimlerChrysler Corporation ("Chrysler") has a provision in its standard franchise agreement with each of its dealers nationwide that bars a dealer from changing its location without DaimlerChrysler's approval.[1]

This case presents the fundamental question whether a state can impair such an important provision of a contract with *no* public justification for its action. The Seventh Circuit held, contrary to longstanding precedents of this Court, that Wisconsin could apply a statute retroactively to restrict DaimlerChrysler's contractual right to bar a dealer's relocation with no *public* (rather than private) benefit to support the legislation.

Moreover, the court of appeals created a circuit split when it held that such an impairment of a vital contract term was "foreseeable," and therefore not "substantial," despite the fact that (a) the State of Wisconsin had never regulated the location of automobile dealerships and (b) the only Wisconsin statute that had ever purported to apply retroactively to franchise agreements was struck down as a violation of the Contract Clause. The Seventh Circuit's holding conflicts with numerous federal and state court decisions, including *Scuncio Motors, Inc.* v. *Subaru*, 555 F. Supp. 1121 (D.R.I. 1982), 715 F.2d 10 (1st Cir. 1983), and *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383, 385 (8th Cir. 1994), in which the Eighth Circuit held that a retroactive application of the Iowa Franchise Act was not foreseeable because previous state franchise legislation was not retroactive and the retroactive application of similar franchise statutes elsewhere had "almost

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[1] On November 17, 1998, Chrysler Corporation merged with Daimler-Benz AG to form a new company. Chrysler Corporation was renamed DaimlerChrysler Corporation, and is now a wholly owned subsidiary of DaimlerChrysler AG.

uniformly been held unconstitutional."

The Seventh Circuit has thus misapplied this Court's precedents and created a circuit conflict on important issues of constitutional law with nationwide significance. Indeed, a large number of franchisors have standard agreements with franchisees in many states. The Seventh Circuit's decision in this case unsettles expectations for all franchisors that seek to promote national uniformity in their franchise agreements.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 148 F.3d 892. The order of the district court (App. B) and the recommendation of the magistrate judge (App. C) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1998. A timely petition for rehearing was denied on September 18, 1998 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the Constitution provides in relevant part: "[n]o State shall * * * pass any * * * Law impairing the obligation of Contracts." U.S. CONST. art. I, § 10.

The pertinent provisions of the Wisconsin Dealer Act, Wis. Stat. Ann. § 218.01(3x), are reproduced in the Appendix.

STATEMENT

A. Wisconsin's Impairment of Chrysler's Franchise Agreement.

Chrysler entered into a franchise agreement in 1988 with respondent Kolosso Auto Sales, Inc. ("Kolosso"). Under the agreement, Kolosso was authorized to buy, sell, and service Jeep and Eagle motor vehicles. In recognition of Chrysler's overriding economic interest in the location of its franchise dealerships, the agreement fixed the precise location of Kolosso's dealership at a specified address in Appleton, Wisconsin. The agreement also barred Kolosso from moving from that location without Chrysler's written approval. App. 1a.

At the time that Chrysler executed its franchise agreement with Kolosso, Wisconsin had no statutes or regulations governing whether or where automobile dealers could relocate. Indeed, neither Wisconsin nor any other state had ever regulated this important and substantial aspect of the franchisor-franchisee relationship.

In 1993, however, five years after Chrysler had executed its franchise agreement with Kolosso, the Wisconsin legislature amended its automobile dealership statute, the Wisconsin Dealer Act ("Dealer Act"), to address the issue of dealership relocation. The legislature added a provision (Section 218.01(3x) (App. 45a-48a.)) to the statute that allows an automobile dealer to relocate over a manufacturer's objection, if the dealer can demonstrate "good cause" for the move before an administrative agency.

The 1993 amendment to the Dealer Act purported to apply retroactively to existing franchise agreements. This was the Wisconsin legislature's first attempt to apply a statute retroactively to franchise contracts since 1981, when its only other attempt was struck down as a violation of the Contract Clause by the Wisconsin Supreme Court. *Wipperfurth* v. *U-*

Haul Co., 304 N.W.2d 767 (Wis. 1981).

Under the 1993 relocation amendment, a dealer must still seek the manufacturer's consent to relocate — if such consent is required by the governing franchise agreement. If the manufacturer chooses not to grant permission, however, it must provide the Wisconsin Division of Hearings and Appeals ("the Division of Hearings") with a written statement explaining its reasons for denying the dealer's request.[2] Any failure to file the statement "shall, notwithstanding the terms of any agreement, constitute approval of the proposed action by the grantor." Wis. Stat. Ann. 218.01(3x)(b)(2) (1997).

After receiving the manufacturer's written statement explaining its denial of a relocation request, the Division of Hearings must determine whether there is "good cause" for granting the relocation request. If the Division of Hearings finds "good cause," the dealer may relocate, despite the manufacturer's objection. In making its "good cause" determination, the administrative agency is not limited to considering — indeed, is not even required to consider — the economic reasonableness of the manufacturer's business decision, but instead may consider *any* relevant factor, including:

a. the reasons for the proposed action;

b. the affected grantor's reasons for not approving the proposed action;

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[2] The Dealer Act originally authorized the Wisconsin Commissioner of Transportation to review relocation requests, but that agency has since been abolished. The Wisconsin legislature has authorized the Division of Hearings to perform this function. See Wis. Stat. Ann. § 218.01(3x)(b)(3).

c. the degree to which the inability to undertake the proposed action will have a substantial and adverse effect upon the motor vehicle dealer's investment or return on investment;

d. whether the proposed action is in the public interest;

e. the degree to which the proposed action will interfere with the orderly and profitable distribution of products affected by the grantor; and

f. the impact of the proposed action on other motor vehicle dealers.

Wis. Stat. Ann. § 218.01(3x)(c)(2).

B. Kolosso's Relocation Request.

Kolosso requested permission from Chrysler in 1995 to relocate its dealership "to another address in Appleton in order to enable it to consolidate the service facilities of its Chrysler dealership with the service facilities of a Toyota dealership that it owned at that address." App. 2a.

Chrysler denied Kolosso's request, because Kolosso's original location was extremely advantageous for the sale of Jeep and Eagle vehicles. The Kolosso dealership was near the primary competition for Jeep and Eagle sport utility vehicles, and relocation would lessen those brands' competitive standing in Appleton. App. 27a. In addition, Kolosso sought to lease its current desirable location in "auto row" to a dealer that sold *used* Jeep and Eagle vehicles, which would dilute the Jeep and Eagle market. *Ibid.*

After receiving Chrysler's denial, Kolosso invoked Wisconsin's amended Dealer Act and filed a complaint with the Division of Hearings requesting permission to relocate. App. 2a.

C. The District Court Action.

In response, Chrysler brought an action for declaratory and injunctive relief in the United States District Court for the Eastern District of Wisconsin. Chrysler contended that retroactive application of Section 218.01(3x) to its preexisting contract with Kolosso violated the Contract Clause of the United States Constitution.

The case was referred to a magistrate-judge, who recommended that the district court abstain in deference to the pending administrative proceeding, which was stayed pending the resolution of the federal action. App. 21a n.2; 40a. Chrysler objected to this recommendation and the district court refused to abstain. *Id.* at 13a-15a.

Instead, the court proceeded to rule against Chrysler on the merits. App. 12a-19a. Chrysler maintained that the 1993 relocation amendment violated the Contract Clause because Chrysler had a reasonable contractual expectation that it would be able to decide unilaterally whether to grant or deny any relocation request by Kolosso — an expectation that was impaired by Section 218.01(3x). Chrysler argued that it could not have anticipated Wisconsin's retroactive regulation of this substantial aspect of its franchise agreement, in light of the fact that the State had never regulated this subject before and that the State Supreme Court in *Wipperfurth* had struck down Wisconsin's only previous attempt to apply a statute retroactively to franchise agreements.

The retroactive amendment of the Dealer Act was also constitutionally defective, Chrysler argued, because it could not be justified as serving a public purpose. Instead, the modification of a manufacturer's contracted-for right to refuse a dealer's requested relocation was created to serve a small special interest group.

The district court rejected Chrysler's arguments and granted summary judgment to Kolosso. App. 19a. The court

stated that "the appropriate inquiry is whether the parties are operating in a heavily regulated industry." *Id.* at 19a n.1. Applying this standard, the court found that Wisconsin had regulated other aspects of Chrysler's franchise relationship with Kolosso and therefore Chrysler had no reasonable expectation that its right to deny a relocation request would not be abrogated by the State. On this basis, the court concluded that the retroactive application of Section 281.01(3x) did not substantially impair Chrysler's contract with Kolosso in violation of the Contract Clause. *Id.* at 18a-19a.

D. The Seventh Circuit's Decision.

Chrysler appealed, arguing that the appropriate standard was not the general inquiry "whether the parties are operating in a heavily regulated industry," but rather the more specific inquiry whether Chrysler had a reasonable expectation that it would be able to deny Kolosso's request to change its location without interference by the State. Chrysler also reiterated its argument that Section 281.01(3x) is special interest legislation, devoid of a public purpose.

The Seventh Circuit affirmed the judgment of the district court, but on narrower grounds (App. 1a-11a). The court began its analysis with the text of the Contract Clause: "No State shall * * * pass any * * * Law impairing the obligation of Contracts." U.S. CONST. art. I, § 10. The court noted that "[i]f the contracts clause of the Constitution were read literally, Chrysler would win hands down. It had a contract that obligated the dealer to stay put if Chrysler wanted him to, and the state relieved the dealer of the obligation." App. 3a.

The court was not persuaded by Kolosso's argument that the "good cause" standard applied during the administrative proceeding preserved Chrysler's contractual rights. "[A]s every employer and employee knows, there is a big difference between having a right (to terminate an employee, or in this

case to control a dealer's location) and having a right that depends on showing that there is good cause for its exercise." *Ibid.* Simply put, "[t]he state has changed the dealership contract to Chrysler's disadvantage. The result will be an added expense to Chrysler — either the loss of car sales by reason of the relocation or the expense of paying Kolosso not to move." App. 5a.

After acknowledging the impairment of Chrysler's important contractual right, the court of appeals stated that "the literal interpretation of the contracts clause has been abandoned" and so "the fact that a state makes a contract more costly to one of the parties does not establish a violation." *Ibid.* Instead, the court held that "[o]f great, and we are inclined to say controlling, importance in the determination of whether a law violates the contracts clause is the foreseeability of the law when the original contract was made." App. 5a. Accordingly, the court applied a "foreseeability" analysis and determined that, since Wisconsin had previously enacted *prospective* legislation preventing franchise *termination* except for good cause, Chrysler should have expected *retroactive* legislation preventing dealer *relocation* in the absence of good cause.

The court adopted conflicting positions on the extent of the impairment of Chrysler's contractual rights. App. 3a-10a. The court initially concluded that the impairment created a "big difference" in Chrysler's rights (*id.* at 3a) and was "a real change," which "we have no reason to doubt * * * hurt [Chrysler]." *Id.* at 9a. It later characterized the 1993 relocation amendment as a "little, predictable impairment[]" which "takes[s] only small steps along a path that was discernable." *Id.* at 10a. The court finally described the 1993 amendment as "not *really* being [an] impairment[]." *Ibid.* (emphasis in original).

The variations in the court's analysis, however, were not accompanied by any factual discussion or citation to any

findings by the district court showing that Chrysler should have foreseen that the Wisconsin legislature would abrogate the important right for which Chrysler had bargained.

In its foreseeability discussion, the Seventh Circuit did recognize that "previous changes in the [Wisconsin] dealership law had been made prospective only, with the exception of one that Wisconsin's highest court struck down under the contracts clause." *Id.* at 9a, citing *Wipperfurth,* 304 N.W.2d at 773. The court, however, failed to distinguish *Holiday Inns Franchising, Inc.* v. *Branstad*, 29 F.3d 383 (8th Cir. 1994), which found a Contract Clause violation under strikingly similar facts, including an absence of prior retroactive state franchise legislation.

The court rejected as irrelevant Chrysler's argument that the 1993 amendment to the Dealer Act was devoid of public purpose. The court instead, without citation, determined that Wisconsin's "small" impairment of Chrysler's contract "do[es]n't have to be justified at all" by a public purpose. App. 10a. It further observed that it "is fortunate for the State of Wisconsin" that such impairments "need not be justified * * *, because the justifications that its lawyers have offered for the 1993 amendment are hard to take seriously." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents substantial questions of nationwide importance concerning the scope of the Contract Clause and the validity of state laws impairing franchise and other contracts. The Seventh Circuit has adopted an expansive interpretation of the power of a state to impair a contract without public purpose and without prior warning that contractual rights might be abrogated. The court of appeals' decision conflicts with this Court's precedents and decisions by other federal and state courts, including the Eighth Circuit, that limit state authority under Contract Clause to impairments that both serve a public purpose and are reasonably

foreseeable.

This Court has laid out a clear structure for the resolution of Contract Clause issues that has, until now, served to focus the analysis of the lower courts. First, although the Contract Clause's prohibition on its face applies to all contractual impairments, this Court has held that it does not "depriv[e] the State of its prerogative of self-protection." *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, 240 (1978). Thus, to avoid application of the Contract Clause, a state must demonstrate that its legislation is within the "domain of the reserve power of a State." *City of El Paso* v. *Simmons*, 379 U.S. 497, 508 (1965).

Second, even if a state satisfies this requirement, there are substantial "limits on the power of a State * * * even in the exercise of its otherwise legitimate police power." *Allied Structural Steel*, 438 U.S. at 244-245. To this end, the Court examines three questions: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 186 (1992). "The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983).

The analysis of the Seventh Circuit in this case ran aground on the threshold requirement for the exercise of state power: a public purpose. The court held that Wisconsin could impair Chrysler's contract with *no* police power justification, despite this Court's admonition that any state impairment of a contract "must be * * * *for an end which is in fact public* * * *." *Triegle* v. *Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) (emphasis added).

Moreover, the court of appeals compounded its threshold error by holding that the adoption of the 1993 relocation amendment was reasonably foreseeable and therefore not a

substantial impairment of Chrysler's contract. This holding creates a split in the circuits over a crucial element of Contract Clause analysis — what indicia should provide warning to a contracting party that a legislative encroachment is "foreseeable." This conflict undermines the contracting stability of nationwide businesses, particularly national franchisors, which by their very nature require uniformity and predictability.

To correct the pernicious effect of the Seventh Circuit's erroneous decision in this case, which unsettles expectations in an area of commerce that depends on national uniformity, this Court should grant review to decide the questions presented.

A. The Seventh Circuit's Decision Conflicts with This Court's Precedents Requiring a State to Provide a Police Power Justification for Impairing a Contract.

On its face, the Contract Clause creates a blanket prohibition against any state impairment of contracts: "No State shall * * * pass any * * * Law impairing the obligation of Contracts." U.S. CONST. art. I, § 10. But, "[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group*, 459 U.S. at 410, quoting *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 434 (1934).

"It is the settled law of this court" that the sole exception to the clear constitutional bar on impairment of contracts is a state's ability to "exercis[e] such powers as are vested in it for the promotion of the common weal." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 503 (1986), quoting *Manigault* v. *Springs*, 199 U.S. 473, 480 (1905). Accord *City of El Paso* v. *Simmons*, 379 U.S. at 508 ("This principle of harmonizing that constitutional prohibition with the necessary residuum of state power has had progressive

recognition in the decisions of this Court.").

While the absolute command of the Contract Clause must bend to accommodate the states' police powers, the Seventh Circuit erroneously concluded that the Contract Clause has been completely "defanged" when a contractual impairment is "small." App. 10a. To the contrary, this Court has repeatedly held that "private contracts are not subject to unlimited modification *under the police power.*" *Allied Structural Steel*, 438 U.S. at 244 n.15 (emphasis added), quoting *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977). And, at a very minimum, states must act *within* their reserved police powers.

The Seventh Circuit disregarded this minimal threshold requirement, which this Court has established in unmistakable terms: "Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised *for an end which is in fact public* * * *." *Triegle* v. *Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) (emphasis added), quoted in *Viex* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 41 (1940).

The court below recognized that there was no "end which is in fact public" in this case — "the justifications that [the State of Wisconsin's] lawyers have offered for the 1993 amendment are hard to take seriously." App. 10a. In light of the absence of a state police power justification, the court had no authority to bypass the unmistakably clear language of the Contract Clause, under which, as the court below acknowledged, "Chrysler would win hands down." *Id.* at 3a.

This Court has repeatedly emphasized that the *only* reason for not reading the Contract Clause literally is to preserve the states' sovereign police power, but the Court has been careful to point out that this exception cannot swallow the constitutional rule. "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitu-

tional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other." *Blaisdell*, 290 U.S. at 439.

By eliminating the requirement that the state provide *any* police power justification for "small" or "little" impairments of contracts, the court below destroyed the constitutional limitation on impairment of contracts. In effect, the Seventh Circuit construed the police power exception to the Clause so broadly that *no* state police power justification is required, as long as a court can characterize the resulting burden as a "small step." Under this analysis, a state can take advantage of the police power exception and freely impair contracts, if it does so gradually, whether or not the state has *any* justification. And under such an interpretation, the Contract Clause is not merely "defanged" (App. 10a), it is completely toothless.

The court below overlooked not only this Court's requirement that any exception to the plain language of the Contract Clause must be grounded in state police power, but also the underlying purpose of that requirement. This Court has made clear that "[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves Group*, 459 U.S. at 412. The Seventh Circuit acknowledged that the amended Dealer Act "could not be 'sustained as an exercise of the police power'" but failed to recognize that this was "because it served only *private interests,* not health or safety." *Keystone Coal*, 480 U.S. at 484 (emphasis added), quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 414 (1922).

The Contract Clause was drafted as a response to widespread state debt-relief laws similarly protecting only the *private interests* of debtors. See *Blaisdell*, 290 U.S. at 427-

28; *Adams* v. *Storey*, 1 F.Cas. 141, 145-46 (C.C.D.N.Y. 1817) (No. 66). Madison explained the injurious effect of letting states impair contracts for private purposes:

> The people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed parts of the community.

THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961). The Founders created a "constitutional bulwark in favor of personal security and private rights" because they realized that allowing states to take the side of individual parties to a contract without a legitimate public purpose would be "contrary to the principles of the social compact and to every principle of sound legislation." *Ibid.*

The court below allowed Wisconsin to make "small" impairments of contracts without any police power justification. Like its historical precedents, the amended Dealer Act was thus designed solely to "provid[e] a benefit to special interests." *Energy Reserves Group*, 459 U.S. at 412. In this way, the amended statute parallels the amended Rhode Island Dealers' Law, the retroactive application of which violated the Contract Clause:

> [t]he predominant thrust of the amendment * * * appears to be to safeguard the private interests of certain automobile dealers * * * rather than to protect any broader societal interest. Without impugning either the role that automobile dealers serve in our society or the wisdom of the [state legislature], this Court cannot elevate the interests which would ineluctably be protected by the retroactive application of this amendment to the level of importance required to justify its otherwise unconstitutional retroactive application.

Scuncio Motors, Inc. v. *Subaru*, 555 F.Supp. 1121, 1130 (D.R.I. 1982) (citations omitted), aff'd, 715 F.2d 10, 13 (1st Cir. 1983).

By allowing a state to impair contracts for purely private purposes, the Seventh Circuit ignored the clear command of the Contract Clause as well as this Court's precedents. Plenary review is necessary to correct this grave constitutional error.

B. The Decision Below Creates a Split in the Circuits Over When Contractual Impairments are Foreseeable.

Even if the Seventh Circuit correctly determined the "threshold matter" of whether the Wisconsin legislature properly exercised its police power in enacting the 1993 relocation amendment, *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 24-25 (1977), the court of appeals erred in its application of the additional Contract Clause limits on the state police power and thereby created a split in the circuits on this issue.

After a state has demonstrated that its legislation is within "th[e] domain of the reserve [police] power of a State," *El Paso*, 379 U.S. at 508, a court must examine "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 186 (1992).

The Seventh Circuit created a conflict in the lower courts over the definition of when a contractual impairment is "substantial." The courts have long struggled to define "substantial." As the Fourth Circuit has noted, the "Supreme Court * * * has provided little guidance as to what constitutes a 'substantial' contract impairment." *Baltimore Teachers Union* v. *Mayor & City Council of Baltimore*, 6 F.3d 1012, 1017 (4th Cir. 1993).

Building on this Court's statement that "state regulation

that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment," (*Energy Reserves Group*, 459 U.S. at 411), the Seventh Circuit and most other circuits focus on the foreseeability of the law, either as a factor in the analysis or "[o]f * * * controlling, importance." App. 5a; see *Toledo Area AFL-CIO Council* v. *Pizza*, 154 F.3d 307, 324-25 (6th Cir. 1998) (foreseeability mitigates the substantiality of an impairment); *Sanitation & Recycling Indus., Inc.* v. *City of New York*, 107 F.3d 985, 993 (2d Cir. 1997) (holding that the extent of disruption of reasonable expectations is "[t]he primary consideration in determining whether the impairment is substantial"); *Mercado-Boneta* v. *Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9, 13 (1st Cir. 1997) ("[T]he expectations of the parties * * * play an important role in determining the substantiality of the contractual impairment"); *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383, 385 (8th Cir. 1994) (focusing on "if the party to the contract who is complaining could have seen it coming"); *Nieves* v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1248 (3d Cir. 1987) (examining "contractual expectations"). But see *Baltimore Teachers Union*, 6 F.3d at 1017 n.7, 1018 ("[T]he inquiry into expectations * * * * would appear to be of little probative value in determining whether a particular impairment is substantial"; defining a substantial impairment as one "where the contract right or obligation impaired was the one that induced the parties to enter into the contract and upon the continued existence of which they have especially relied.").

The lower courts' reliance on a "foreseeability" analysis requires some identification of the indicia that make future legislation foreseeable to contracting parties. In *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383, 385 (8th Cir. 1994), the Eighth Circuit determined that the retroactive Iowa Franchise Act was not foreseeable for two reasons: because previous Iowa franchise legislation had not been retroactive

and because the retroactive application of similar franchise statutes elsewhere had "almost uniformly been held unconstitutional." 29 F.3d at 385.

Identical reasons support the unconstitutionality of the 1993 amendment of the Dealer Act at issue here, but the Seventh Circuit, while aware of the Eighth Circuit's decision, (see App. 6a (citing *Holiday Inns,* 29 F.3d 383)), disregarded its holding.

The parallels between the cases could not be clearer. As the Seventh Circuit noted, "previous changes in [Wisconsin] dealership law," like the Iowa franchise legislation, "had been made prospective only, with the exception of one that Wisconsin's highest court struck down under the contracts clause." App. 9a, citing *Wipperfurth* v. *U-Haul Co.*, 304 N.W.2d 767, 773 (Wis. 1981). Franchisors with dealers in Wisconsin were thus under no notice from the Wisconsin legislature that it would, or could legally, deviate from its established practice of making franchise law changes prospective only.

Given these indistinguishable facts, the Seventh Circuit's holding creates a direct conflict with the Eighth Circuit over when contracting parties can reasonably and legitimately rely on state government precedents in anticipating future government regulation.

The Seventh Circuit created a split not only on the effect of previous legislation, but also on the ability of contracting parties to rely on existing case law. The court below held that contracting parties should have "foreseen," and assumed while contracting, that Wisconsin would reject the position consistently followed by other courts rejecting retroactive application of franchise laws. See, *e.g.*, *Northshore Cycles, Inc.* v. *Yamaha Motor Corp.*, 919 F.2d 1041, 1044 (5th Cir. 1990) (retroactive amendments to motorcycle dealership law violate Contract Clause); *Scuncio Motors, Inc.* v. *Subaru*, 555 F.Supp. 1121, 1130 (D.R.I. 1982) (retroactive application of

Dealer's Act unconstitutional), aff'd 715 F.2d 10, 13 (1st Cir. 1983) (retroactive application "present[s] a serious constitutional question"); *Fireside Chrysler-Plymouth Mazda, Inc.* v. *Chrysler Corp.*, 472 N.E.2d 861, 866 (Ill. App. Ct. 1984) (retroactive application of Motor Vehicle Franchise Act unconstitutional); *Ward* v. *Chevron U.S.A., Inc.*, 598 P.2d 1027, 1028-29 (Ct. App. Ariz. 1979) (retroactive application of Petroleum Products Franchises Act unconstitutional); *Yamaha Parts Distr. Inc.* v. *Ehrman*, 316 So.2d 557, 559 (Fla. 1975) (retroactive amendment to state franchise law unconstitutional); *United States Brewers' Association, Inc.* v. *State of Nebraska,* 220 N.W.2d 544, 548-49 (Neb. 1974) (retroactive distributorship law unconstitutional); *Superior Motors, Inc.* v. *Winnebago Indus, Inc.*, 359 F.Supp. 773, 779 (D.S.C. 1973) (retroactive application of franchise law unconstitutional); *Globe Liquor Co.* v. *Four Roses Distillers Co.*, 281 A.2d 19, 21 (Del. 1971) (retroactive application of Franchise Security Law unconstitutional).

Unlike the Seventh Circuit, the Eighth Circuit in *Holiday Inns* recognized that "[i]t is absolutely plain, * * * that the retrospective application of statutes similar to the one here * * * has almost uniformly been held unconstitutional, and *this is a datum on which franchisors are presumably allowed to rely while bargaining* * * *." 29 F.3d at 385 (emphasis added).

The Seventh Circuit's decision leaves contracting parties and the lower courts in disarray. This Court should grant review to settle the law on this important issue.

C. The Issues Presented Here Require a Uniform National Interpretation.

The Seventh Circuit's decision presents important constitutional issues that require national resolution. *First,* the decision requires review because it directly casts doubt on nationwide franchise contracts. The defining characteristics of franchises are their uniform and widespread nature. See,

e.g., *Queen City Pizza, Inc.* v. *Domino's Pizza, Inc.*, 124 F.3d 430, 433 (3d Cir. 1997) ("The essence of a successful nationwide * * * chain is product uniformity and consistency."). Since national uniformity provides a comparative advantage to franchises, a split in the circuits on basic franchise contracting issues is particularly detrimental to these widespread business arrangements. Cf. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 387 (1967) (Stewart & Harlan, JJ., concurring in part and dissenting in part) ("Indiscriminate invalidation of franchising arrangements would eliminate their creative contributions to competition and force suppliers to abandon franchising and integrate forward to the detriment of small businesses.").

Moreover, the Seventh Circuit not only created a direct circuit split on a vital element of Contract Clause analysis, see pages 15-18, *supra,* but it also became the first circuit court to uphold a retroactive franchising statute challenged on Contract Clause grounds. Most courts have barred the retroactive application of franchising statutes or amendments when presented with a challenge under the Contract Clause. See page 18-19, *supra*.

The court of appeals in this case, however, became the first circuit to join the minority position upholding retroactive franchising statutes in the face of Contract Clause challenges. See *Anderson's Vehicle Sales, Inc.* v. *OMC-Lincoln*, 287 N.W.2d 247, 411-12 (Mich. Ct. App. 1980) (sustaining retroactive amendment to dealer agreement statute); *Ruiz* v. *Economics Lab., Inc.*, 274 F.Supp. 14, 17 (D.P.R. 1967) (retroactive Puerto Rico Dealer's Act constitutional); *Willys Motors, Inc.* v. *Northwest Kaiser-Willys, Inc.*, 142 F.Supp. 469, 472 (D.Minn. 1956) (upholding retroactive automobile dealer law).

Second, the Seventh Circuit's decision holding that "a state [can] make[] a contract more costly to one of the parties" (App. 5a) without *any* police power justification

conflicts with established Supreme Court precedents vital to national enterprises like DaimlerChrysler. Large national corporations are the most likely to be taken advantage of by local interests that have the political clout to sweeten their contracts after the fact through improper state impairment of contracts. As one scholar has explained:

> [S]tate and local legislatures contain no representatives of * * * those persons outside the jurisdiction upon whom the weight of the local laws may fall. And since the force of special interest groups is markedly greater in local legislative bodies than in the federal political process, state and local lawmaking that affects * * * persons engaged in interstate activities may not be * * * trusted. The phenomenon is most clearly exemplified by laws that discriminate against outsiders to the benefit of local interests * * *.

Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review,* 89 YALE L.J. 1552, 1584-1585 (1977) (citations omitted).

The Contract Clause was designed to promote national interests and stable transactions. See pages 13-15, *supra*. If the decision below is allowed to stand, the Clause will instead allow state legislatures to become the province of local special interests to the detriment of national commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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